Teknik Cekap Sdn Bhd v Public Bank Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–08–68 OF 1994
SHAIK DAUD, NH CHAN AND SITI NORMA YAAKOB JJCA
4 MAY, 3 AND 4 JULY 1995

***Contract** — Building contract — Performance bond — Bond given by sub-contractor to main contractor to guarantee proper performance of sub-contract works — Whether 'on demand' bond or conditional bond — Whether mere demand from main contractor sufficient to make call on bond — Whether notice of demand must state basis of claim against sub-contractor*

The appellant ('Teknik') was the main contractor for Wisma Goldhill, Jalan Raja Chulan, Kuala Lumpur and had engaged a company called Lightweight Concrete Sdn Bhd ('Lightweight') as its sub-contractor for the design, manufacture, supply and delivery of concrete panels ('the contract'). Lightweight obtained a performance bond for RM422,000 from Public Bank Bhd ('PBB') in favour of Teknik to guarantee the proper performance of the sub-contract works. Subsequently, Teknik issued two letters purportedly calling for payment of the bond from PBB, stating that 'we wish to make a claim for the full amount against the abovesaid performance bond'. PBB immediately paid Teknik the RM422,000 and then uplifted a fixed deposit of RM42,000 given by Lightweight as security for the performance bond and demanded payment of the difference. Lightweight, however, contended that PBB had no claim against it and demanded that PBB reinstate the fixed deposit account as the call on the bond was invalid, not being an 'on demand bond' but a 'conditional bond'. Lightweight issued a writ against PBB seeking, inter alia, a declaration that the call on the bond was invalid and an order for reinstatement of the RM42,000 with interest. PBB then issued a third party notice and statement of claim against Teknik for a declaration that the call on the bond was invalid and an order that the sum of RM422,000 be repaid by Teknik to PBB. The trial judge held that Teknik's notices of demand were bad in law as they did not state that Lightweight had breached or failed to execute the sub-contract, and granted both Lightweight's and PBB's applications. Teknik appealed vis-à-vis PBB. The issue for determination in this appeal was whether the performance bond was an 'on demand' bond or a 'conditional bond'.

Held, dismissing the appeal:

(1) (Per **Shaik Daud JCA**) From the very wording of the performance bond itself, it was clear and unequivocal that what would trigger off the guarantee was Lightweight's breach or failure to execute the contract. Only then would PBB's liability arise. Therefore giving the words in the performance bond its plain meaning, it was a conditional bond.

(2) (Per **Shaik Daud JCA**) As the performance bond was a conditional bond, the letters of demand calling for payment of the bond had to assert the basis of the claim, ie that Lightweight had breached or failed to perform the sub-contract. Since Teknik had failed to do so in its letters, the letters of demand were invalid. Consequently any payment made thereunder by PBB was also invalid and ought to be returned.

Cases referred to

Brightside Mechanical and Engineering Services Group Ltd & Anor v Standard Chartered Bank & Anor [1989] 3 MLJ 13 (refd)
Edward Owen Engineering Ltd v Barclays Bank International Ltd & Anor [1978] 1 All ER 976; [1977] 3 WLR 764 (refd)
Esal (Commodities) and Relton v Oriental Credit and Wells Fargo Bank NA [1985] 2 Lloyd's Rep 546 (folld)
Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd [1995] 1 MLJ 149 (distd)
IE Contractors Ltd v Lloyds Bank plc and Rafidain Bank (1990) 51 BLR 1 (folld)
Kirames Sdn Bhd v Federal Land Development Authority [1991] 2 MLJ 198 (distd)

(3) (Per **Siti Norma Yaakob JCA**) Clause 1 of the performance bond specified the circumstances under which a demand could be made. Thus, it required more than a mere demand to trigger payment. The demand had also to assert the basis why the claim was made, though not necessarily the very nature of the wrong done or omitted to be done by Lightweight. To that end, Teknik's notices were bad in law for non-compliance with cl 1.

Cases referred to

Esal (Commodities) and Relton v Oriental Credit and Wells Fargo Bank NA [1985] 2 Lloyd's Rep 546 (refd)
Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd [1995] 1 MLJ 149 (distd)
IE Contractors Ltd v Lloyds Bank and Rafidain Bank (1991) 51 BLR 1 (folld)
Kirames Sdn Bhd v Federal Land Development Authority [1991] 2 MLJ 198 (distd)

[Bahasa Malaysia summary

Perayu ('Teknik') adalah kontraktor utama untuk Wisma Goldhill, Jalan Raja Chulan, Kuala Lumpur dan telah menggaji sebuah syarikat bernama Lightweight Concrete Sdn Bhd ('Lightweight') sebagai sub-kontraktornya untuk rekaan, pembuatan, bekalan dan penghantaran panel konkrit ('kontrak itu'). Lightweight telah memperolehi suatu bon pelaksanaan bagi jumlah RM422,000 daripada Public Bank Bhd ('PBB') atas nama Teknik untuk menggerenti pelaksanaan wajar kerja sub-kontrak itu. Kemudiannya, Teknik telah mengeluarkan

A dua pucuk surat kononnya untuk menuntut bayaran bon itu daripada PBB, dengan menyatakan bahawa 'kami ingin membuat tuntutan untuk jumlah penuh bon pelaksanaan yang dinyatakan di atas'. PBB dengan segera membayar Teknik jumlah RM422,000 itu dan kemudiannya mengeluarkan simpanan tetap berjumlah RM42,000 yang diberikan oleh Lightweight sebagai cagaran untuk bon B pelaksanaan itu dan menuntut bayaran baki jumlah yang telah dibayarnya itu. Lightweight, bagaimanapun, menegaskan bahawa PBB tidak mempunyai apa-apa tuntutan terhadapnya dan mendesak supaya PBB mengembalikan akaun simpanan tetap itu kerana tuntutan atas bon itu tidak sah, memandangkan ianya bukan suatu 'bon atas C permintaan' tetapi suatu 'bon bersyarat'. Lightweight telah mengeluarkan suatu writ terhadap PBB untuk menuntut, antara lain, suatu deklarasi bahawa tuntutan atas bon itu tidak sah dan suatu perintah untuk pengembalian jumlah RM42,000 itu dengan faedah. PBB kemudiannya tleah mengeluarkan suatu notis pihak ketiga dan pernyataan tuntutan terhadap Teknik untuk suatu deklarasi bahawa D tuntutan atas bon itu tidak sah dan suatu perintah bahawa jumlah RM422,000 itu dibayar semula oleh Teknik kepada PBB. Hakim perbicaraan telah memutuskan bahawa notis tuntutan yang dikeluarkan oleh Teknik adalah tidak sah di sisi undang-undang kerana mereka tidak menyatakan bahawa Lightweight telah E memungkiri atau gagal melaksanakan sub-kontrak itu, dan membenarkan kedua-dua permohonan Lightweight dan PBB. Teknik telah membuat rayuan berkenaan dengan PBB. Isu untuk diputuskan di dalam rayuan ini adalah sama ada bon itu merupakan suatu bon 'atas permintaan' ataupun suatu bon 'bersyarat'.

F **Diputuskan**, menolak rayuan itu:

(1) (Oleh **Shaik Daud HMR**) Daripada susunan kata bon pelaksanaan itu sendiri, adalah jelas dan tidak taksa bahawa apa yang akan mencetuskan bon gerenti itu adalah kemungkiran atau kegagalan Lightweight untuk melaksanakan kontrak itu. Pada G ketika itu baharulah liabiliti PBB akan timbul. Oleh yang demikian, dengan memberikan maksud biasa kepada perkataan di dalam bon pelaksanaan itu, ia adalah suatu bon bersyarat.

(2) (Oleh **Shaik Daud HMR**) Oleh kerana bon pelaksanaan itu adalah suatu bon bersyarat, surat tuntutan yang meminta bayaran H bon itu mesti menyatakan asas tuntutan itu, iaitu bahawa Lightweight telah memungkiri atau gagal melaksanakan sub-kontrak itu. Oleh sebab Teknik gagal berbuat demikian di dalam suratnya, surat tuntutan tersebut tidak sah. Akibatnya, sebarang bayaran yang dibuat di bawahnya itu juga tidak sah dan harus dikembalikan.

I (3) (Oleh **Siti Norma Yaakob HMR**) Fasal 1 bon pelaksanaan itu menetapkan keadaan di mana suatu tuntutan boleh dibuat. Oleh itu, untuk mencetuskan bayaran, apa yang diperlukan adalah lebih daripada suatu tuntutan semata-matanya. Tuntutan itu

mesti juga menyatakan asas mengapa tuntutan itu dibuat, walaupun tidak semestinya sifat sebenar kesalahan yang dilakukan atau tidak dilakukan oleh Lightweight. Lantaran itu, notis yang dikeluarkan oleh Teknik itu tidak sah di sisi undang-undang akibat ketidakpatuhan dengan fasal 1.] A

[*Editorial Note*: The appellant has filed an application for leave to appeal to the Federal Court vide Civil Application No 08–50–95.] B

Notes

For cases on performance bonds, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1308–1309. C

Complete list of cases referred to

Brightside Mechanical and Engineering Services Group Ltd & Anor v Standard Chartered Bank & Anor [1989] 3 MLJ 13

Edward Owen Engineering Ltd v Barclays Bank International Ltd & Anor [1978] 1 All ER 976; [1977] 3 WLR 764 D

Esal (Commodities) and Relton v Oriental Credit and Wells Fargo Bank NA [1985] 2 Lloyd's Rep 546

Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd [1995] 1 MLJ 149 E

IE Contractors Ltd v Lloyds Bank plc and Rafidain Bank (1990) 51 BLR 1

Kirames Sdn Bhd v Federal Land Development Authority [1991] 2 MLJ 198

Legislation referred to F

Contracts Act 1950 s 73

Appeal from: Civil Suit No D5–22–1100–93 (High Court, Kuala Lumpur)

G

WM Chang (*Raja, Darryl & Loh*) for the appellant.
CT Tan (*Iza Ng Yeoh & Kit*) for the respondent.
David Morais and *Gopal Sreenevasan* (*David Morais*) for the interveners.

Cur Adv Vult H

4 May 1995

Shaik Daud JCA: This is an appeal from the decision of the High Court sitting at Kuala Lumpur whereby the court held that a claim by Teknik Cekap Sdn Bhd ('Teknik') on a performance bond was invalid on the ground that a demand made by Teknik pursuant to the performance bond failed to assert the failure of a sub-contractor to perform the sub-contract or had committed a breach thereof. I

A The facts of the case are not in dispute and they are that pursuant to a written agreement dated 26 August 1991 ('the agreement') a company called Lightweight Concrete Sdn Bhd ('Lightweight') was engaged by Teknik as their sub-contractor for, inter alia, the design, manufacture, supply and delivery of concrete panels for a project known as 'Wisma Goldhill' in Jalan Raja Chulan, Kuala Lumpur. Pursuant to this agreement B Lightweight was required to obtain a performance bond for RM422,000 in favour of Teknik to guarantee the proper performance of the sub-contract works. On 1 June 1992, Public Bank Bhd ('PBB') issued a performance bond ('the bond') in favour of Teknik, one of the conditions being that Lightweight was to deposit RM42,000 in a fixed deposit account with a C lien over the account in the name of PBB.

By two letters dated 26 August 1993 and 27 August 1993, Teknik purportedly called for payment of the bond from PBB. As a result of the purported call, PBB immediately paid Teknik RM422,000 and subsequently uplifted Lightweight's fixed deposit account of RM42,000 and demanded D payment of RM399,342.99 from Lightweight being the difference between the amount in the fixed deposit account and the amount paid to Teknik under the bond.

Lightweight contends that PBB had no claim against them and demanded that PBB reinstate the fixed deposit account on the ground that the call on the bond was invalid as the bond was not an 'on demand bond' E but a 'conditional bond'. As a result, Lightweight through their solicitors issued a letter dated 1 September 1993 to PBB demanding the reinstatement of the fixed deposit account with interest. When there was no response to this demand, Lightweight issued a specially endorsed writ against PBB dated 1 October 1993 seeking, inter alia, a declaration that the call on the F bond was invalid and an order for reinstatement of the RM42,000 with interest. On 1 November 1993 and 16 February 1994, PBB issued a third party notice and statement of claim against Teknik. On 21 March 1994, PBB applied for leave to sign final judgment against Teknik for a declaration that the call on the bond was invalid and an order that the sum of RM422,000 be repaid by Teknik to PBB. Both Lightweight's and PBB's G applications were heard on the same day and the learned judge on 2 August 1994 granted both the applications. Hence this appeal by Teknik against the decision of the learned judge vis-à-vis PBB.

As I see it, there is only one issue in this appeal, and a very important issue at that, ie whether in the circumstances of this case the bond issued H by PBB is an 'on demand' bond or a 'conditional bond'

It is the contention of learned counsel on behalf of the appellant both in the court below and in this court that this bond being an 'on demand' bond, and a demand simpliciter without asserting any reasons thereto when calling on the bond, is sufficient and valid as was done in this case. I It is not disputed that the two letters dated 26 August 1993 and 27 August 1993 issued by Teknik to PBB calling upon the bond did not mention anything but merely says that they being the beneficiary of the bond wish to claim for the full amount of the bond. Learned counsel for the respondent,

on the other hand, similarly both in the court below and in this court, contends that the bond was not an 'on demand' bond but a 'conditional' bond and therefore in calling upon the bond, it was encumbant upon Teknik to state the alleged breach by Lightweight before the payment on the bond could be made. He contends that the wording in the bond itself clearly states that it is a conditional bond. He contends that on a true construction of the bond, there was no liability under the bond unless and until there had been a breach by Lightweight, and before payment could be made by PBB, Teknik not only was required to make a written demand but was also in the written demand required to assert that the demand was made pursuant to Lightweight having breached their sub-contract, or failed to perform their obligations. In the present case, as adverted to earlier, in their letters of demand to PBB no mention was made that the demand was as a result of a breach by Lightweight. Therefore, the demand was invalid and consequently the payment by the PBB was also invalid.

Learned counsel for the appellant disagrees, he contends that the wording of the bond in this case is clear that it is an 'on demand' bond. He says the bond being a document issued by the bank itself, the bank ought to know its terms and conditions. Therefore since the bond states that the bank shall pay on demand, the bank is bound to pay once the demand is made. He contends that where there is a demand on the bank it is implicit that the demand is made because there was either a breach or non-performance of the contract and this the bank ought to know. He adds that all that is required to trigger the payment by the bank was the written demand and nothing else.

Having considered the submissions it is relevant to find out what therefore is a performance bond. As I see it there is nothing special or unique in a performance bond. It is in fact a written contract of guarantee by a bank, other financial institutions or in some cases an insurance company, whereby they guarantee the due performance of a contract and in the event of a breach or non-performance of the contract, they guarantee to pay, on a written demand being made, the sum stipulated in the guarantee. Therefore a performance bond is nothing more than a written guarantee, and in order to interpret the obligations of the bank, one need only to look at the written bond itself to determine what are the terms and conditions agreed upon between the parties. A great deal, therefore, depends on the wording of the bond itself.

It is, therefore, pertinent to set out the relevant clause of the bond which has caused this concern in this case. It can be found on the first page of the bond dated 1 June 1992 issued by PBB and is as follows:

> If the sub-contractor (unless relieved from the performance of any clause of the contract or by statute or by the decision of a tribunal of competent jurisdiction) shall in any respect fail to execute the contract or commit any breach of his obligations thereunder then the guarantor shall pay to the contractor up to and not exceeding the sum of RM422,000 (Malaysian Ringgit four hundred twenty two thousand) only representing 10% of the contract value or such part thereof on the contractor's demand notwithstanding any contestation or protest by the sub-contractor or by the

guarantor or by any other third party, provided always that the total of all partial demands so made shall not exceed the sum of RM422,000 (Malaysian Ringgit four hundred twenty two thousand) only and that the guarantor's liability to pay the contractor as aforesaid shall correspondingly be reduced proportionate to any partial demand having been made as aforesaid.

It 'involves a straightforward exercise of construction, or interpretation, of the bond to discover the intention of the parties'. This is the unanimous view expressed in *IE Contractors Ltd v Lloyds Bank plc and Rafidain Bank* (1990) 51 BLR 1.

Much of the confusion and problems in interpreting performance bonds arose with the celebrated decision of the English Court of Appeal in *Edward Owen Engineering Ltd v Barclays Bank International Ltd & Anor* [1978] 1 All ER 976; [1977] 3 WLR 764. In that case, Lord Denning MR having pointed out that a performance bond was similar to a letter of credit added that performance bonds are virtually promissory notes payable on demand. Since then it has been seen that performance bonds are, however, not on the same footing as letters of credit, they do not form part of the financial transactions supporting the performance of a contract. They are in fact collateral and subsidiary to a contract. In *IE Contractors Ltd v Lloyds Bank plc and Rafidain Bank*, the court made a distinction between letters of credit and performance bonds and made it clear that the question of what was required to comply with a particular performance bond was one of construction of that bond. There is no doubt that some performance bond must be paid merely on a demand being made, and whether this is so must depend on the wording of the bond itself. In *Kirames Sdn Bhd v Federal Land Development Authority* [1991] 2 MLJ 198, the guarantee provided that the guarantor shall 'irrevocally and absolutely guarantee payment on demand without having to assign any reason whatsoever for such demand'. In the light of these clear and unambiguous wording it can be said that this is an unconditional and a pure 'on demand' bond. What is required to trigger payment in such bonds is the demand simpliciter. In *Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd* [1995] 1 MLJ 149, the then Supreme Court on examination of the performance bond in that case held that it was a pure on demand guarantee and therefore a mere demand would trigger off the guarantees without asserting any reasons thereto. In that case the guarantor agrred to 'unconditionally and irrevocably guarantee payment ...'.

In the present case, however, the bond began with the words '*If* the sub-contractor ... shall in any respect fail to execute the contract or commit any breach of his obligations thereunder *then* the guarantor shall pay ...' (emphasis added). Now from the very wording of the bond itself it is clear and unequivocal that what would trigger off the guarantee is the sub-contractor's failure to execute the contract or commit any breach thereof. Then and only then would the liability of the guarantor arise. Therefore giving the words in the bond their plain meaning, it cannot by any stretch of imagination be said that the bond in the circumstances of this case is an unconditional bond. Similarly in *Esal (Commodities) and Relton v Oriental Credit and Wells Fargo Bank NA* [1985] 2 Lloyd's Rep

546, the performance bond stated 'we undertake to pay the said amount on your written demand *in the event* that the supplier fails to execute the contract in perfect performance ...' (emphasis added) the Court of Appeal held that:

> ... however in additional to the beneficiary making the demand he must also inform the bank that he did so on the basis provided for in the performance bond ...

The court there found that when making the demands the beneficiary did not assert that there was a failure to perform the contract. The court came to the conclusion that liability under the performance bond was conditional and the condition had not been complied with. The court went on to say that this interpretation not only gave meaning but also effect to the words 'in the event that the supplier fails ...' which otherwise would be mere surplusage. This decision was followed by the Court of Appeal in *IE Contractors*. In that case the performance bond stated as follows:

> We undertake to pay you, unconditionally, the said amount on demand, *being your claim for damages* brought about by the abovenamed principal. (Emphasis added.)

In this case, it was further held that there need not be any precise words as provided for in the performance bond to be stated in the letter of demand but such a letter must at least assert in substance, the basis of the claim, which in that claim was damages for breach of contract. The proposition in the *Esal* case was followed by the Singapore High Court in *Brightside Mechanical and Engineering Services Group Ltd & Anor v Standard Chartered Bank & Anor* [1989] 3 MLJ 13, where the court held that since the beneficiary did not in their demand notice indicate that they had made a determination (as required by the performance guarantee) but merely had a belief, the demand notice did not comply with the requirements of the performance guarantee.

The line of authorities seem to indicate that the courts adopted a strict interpretation of performance bonds and that in making demands on them the beneficiary must adhere strictly to their terms. This line of interpretation seems to me to be more sensible as it requires the beneficiary of the performance bond to state in plain terms that which they must, if honest, be prepared to assert, and may place him in peril of a charge of obtaining money by deception if later it turns out to be untrue to his knowledge. Furthermore banks, other financial institutions and perhaps insurance companies, would be left to assume that a breach of the contract had taken place. This is more so as they cannot challenge the demand. The banks are in fact not required to be told the nature of the breach or who is to be blamed for the breach. That is not the concern of the bank but it must be asserted that the demand is made as a result of a breach by the sub-contractor.

In the present case as adverted to earlier, the letter of demand to the bank merely states that, 'We ... hereby give you notice that we wish to make a claim for the full amount against the above said performance bond.'

Nothing in the demand mentioned either expressly or at least in substance that the sub-contractor had failed to perform the sub-contract or that it had committed a breach thereof.

Having given this matter my serious consideration and applying the proposition in *Esal*'s case which proposition I agree and accept, I hold that the appellant had failed to assert the very basis of the demand as required by the bond and, therefore, the letter of demand made pursuant to the performance bond in this case was invalid and consequently any payment made thereunder by PBB is also invalid and ought to be returned. The learned judge, therefore, was right when he held that in the circumstances of this case, the demand made pursuant to the bond must assert the failure of the sub-contractor to execute the sub-contract before the said demand can be met and paid.

For the above reasons, I would affirm the learned judge's decision and dismiss this appeal with costs.

4 July 1995

NH Chan JCA: I have had the benefit of reading the judgments of my lord, Shaik Daud JCA, and my lady, Siti Norma Yaakob JCA, with which I agree.

3 July 1995

Siti Norma Yaakob JCA: The only issue raised in this appeal is whether two written notices dated 26 and 27 August 1993, issued by the appellant ('Teknik'), demanding the payment of RM422,000 ('the guaranteed sum') due on a performance bond from the respondent ('the bank'), are valid in law to justify the bank's action to meet the demands by paying out the guaranteed sum to Teknik, the beneficiary.

It is not disputed that as the main contractor for the superstructural works for the project known as Wisma Goldhill in Jalan Raja Chulan, Kuala Lumpur, Teknik had sub-contracted part of the works of the project to Lightweight Concrete Sdn Bhd ('the sub-contractor'), the plaintiff in the court below, but who is not a party in this appeal before us. In fact, the sub-contractor had filed a notice to intervene in the proceedings before us but when it was pointed out that it had already obtained judgment against the bank, for which no appeal had been lodged by the bank, the sub-contractor reconsidered its position and decided not to proceed with its application.

A term in the sub-contract stipulates that the sub-contractor had to obtain a performance bond to the value of the guaranteed sum to secure its obligations to Teknik under the sub-contract.

That performance bond was provided by the bank in favour of Teknik and under it the bank agreed to guarantee the due performance of the sub-contract by the sub-contractor to the extent of the guaranteed

sum, subject to other terms and conditions contained in the performance bond. In consideration of the issuance of such a bond, the sub-contractor, in turn, executed a letter of indemnity indemnifying the bank for all loss that may be suffered by the bank as a result of providing the performance bond. A

Subsequently, Teknik enforced the performance bond against the bank by issuing the two letters of demand which were duly complied with by the bank by paying out the guaranteed sum due under the bond to Teknik. B

In maintaining its stand that it had fulfilled all its obligations to Teknik, the sub-contractor sued the bank contending that the payment by the bank had been wrongly and mistakenly made, as the notices of demand were bad in law as they did not comply with the terms and requirements of the performance bond for they failed to assert the basis why the demands were made in the first place, ie the sub-contractor had committed a breach of its obligations under the sub-contract. In that suit, the sub-contractor's principal claim was for a declaration that the payment out by the bank under the performance bond was wrong in law. The bank, in turn, issued a third party notice to Teknik praying for the following two issues to be determined: C D

(1) whether Teknik's two notices of demand had complied with the provisions of the performance bond; and E

(2) if the answer is in the negative, the bank also seeks a refund of the guaranteed sum which it had paid to Teknik under s 73 of the Contracts Act 1950, together with interest and costs.

In proceedings for summary judgment in the court below, both the sub-contractor and the bank filed separate applications to enter final judgments in the case of the sub-contractor against the bank and in the case of the bank against Teknik. It is in respect of the bank's application for summary judgment against Teknik that we are more concerned with in this appeal, where the learned trial judge, Abdul Malek J, ruled that the notices of demand were bad in law as they did not state that the sub-contractor had failed to execute or had committed a breach of the sub-contract — conditions that are specifically provided for in the performance bond. It, therefore, follows that payment out by the bank of the guaranteed sum was wrongly and mistakenly made, and the learned judge then ordered that Teknik refund the guaranteed sum to the bank together with interest and costs. It is against this order that the present appeal is founded. F G H

The two notices of demand were issued by Teknik pursuant to the performance bond, the agreement that provides all the rights and obligations of Teknik to the bank and vice versa. Hence it is to the performance bond that one must look to determine whether the notices have been issued in accordance with the terms and conditions agreed to by the parties. See the case of *IE Contractors Ltd v Lloyds Bank and Rafidain Bank* (1991) 51 BLR 1. I

A Clause 1 of the performance bond stipulates what those conditions are and that clause is worded in the following manner:

> If the sub-contractor (unless relieved from the performance of any clause of the contract ...) shall in any respect fail to execute the contract or commit any breach of his obligations thereunder then the guarantor [ie the bank] shall pay to the contractor [ie Teknik] up to and not exceeding the sum of RM422,000 (Malaysian Ringgit four hundred twenty two thousand) only representing 10% of the contract value or such part thereof on the contractor's demand, notwithstanding any contestation or protest by the sub-contractor or by the guarantor or by any other third party ...

B

C Teknik interprets that clause to be just this — that the performance bond is an on demand performance bond and the liability to pay arises once a demand is made and the fact that the demand in this case is silent as to any wrongdoing or omission committed by the sub-contractor is immaterial to the validity of the demand as the issuance of the demand itself implies that a breach had already been committed by the sub-contractor.

D In this respect, Mr WM Chang, counsel for Teknik, relies on the reservation expressed by Neill LJ in the case of *Esal (Commodities) and Relton v Oriental Credit and Wells Fargo Bank NA* [1985] 2 Lloyd's Rep 546. Whilst agreeing with the majority decision of that case, the learned Lord Justice expressed his reservation on the very same issue that is now before us, as follows:

E

> In the absence of any requirement in the performance bond itself for some documents to support the demand, I would be reluctant to introduce into this field any rule which provided scope for an argument that the qualifying event had not been sufficiently identified.

F As this is only a reservation made in passing, we do not share the doubts entertained by the learned Lord Justice in that case.

In *Esal*'s case, the form of undertaking was expressed as follows:

> We undertake to pay the said amount on your written demand *in the event* that the supplier fails to execute the contract in perfect performance. (Emphasis added.)

G

Ackner LJ, who delivered the principal judgment, had this to say about the undertaking:

> ... in addition to the beneficiary making the demand, he must also inform the bank that he does so on the basis provided in the performance bond itself. This interpretation not only gives meaning and effect to the words 'in the event that the supplier fails ...' which otherwise would be mere surplusage, but it in no way imposes an extravagant demand upon the bank.

H

Our attention was also drawn to the case of *Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd* [1995] 1 MLJ 149, where the then Supreme Court in interpreting a performance bond that was before it, held:

I

> ...[it] was ... a pure on demand guarantee, and all that was required to trigger it was a demand in writing. It would not be dependent or conditional on the production of a document, eg a certificate from some nominated

> independent person like an architect as in some building contracts, etc. Neither was it worded to make it conditional for Bank Bumiputra, the issuer of the performance bond, to inquire into the existence or otherwise of any breach of any contractual obligation between the beneficiary of the bond, ie the buyer in this case and the seller; at the behest of the latter itself, the performance bond was issued.

The undertaking to pay in *Esso Petroleum*'s case simply reads as follows, '... we hereby unconditionally and irrevocably guarantee the payment to EPMI' and the mode of making a claim under such a guarantee was worded as follows:

> All claims, if any, in respect of or under this guarantee must be made in writing and received by us at any time on or before the expiry of this guarantee.

Likewise, the guarantee in *Kirames Sdn Bhd v Federal Land Development Authority* [1991] 2 MLJ 198, where the terms provided that the guarantor shall irrevocably and absolutely guarantee payment forthwith on demand without the beneficiary assigning any reason whatsoever for such demand.

To that extent, the provisions of the bank guarantees in the *Esso Petroleum* case and the *Kirames* case are individually distinguishable from cl 1 of the performance bond before us.

Clause 1 has identified the circumstances when a demand can be made in the same manner that the parties in the *Esal* case had expressed the circumstances when the liability to pay shall arise. Unlike the bank guarantees in *Esso Petroleum* and *Kiramas* which were straightforward on demand guarantees, where only a demand per se is necessary to trigger payment, the performance bond before us does not fall in the same category. It takes more than a mere demand to trigger payment. The demand must also assert the basis why the claim is made in the first place as clearly stated in cl 1, though not necessarily the very nature of the wrong done or omitted to be done by the sub-contractor. To that end, Teknik's notices that 'we wish to make a claim for the full amount against the abovesaid performance bond' are bad in law for non-compliance with cl 1.

On that conclusion, I, on my part, see no reason to disturb the findings of the trial judge and for that reason this appeal is dismissed with costs and the deposit is to be paid out to the respondent to account for its taxed costs.

Appeal dismissed.

Reported by Anne Khoo